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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

MARSHALL SPIEGEL,

Petitioner,

v.

STATE FARM FIRE AND CASUALTY CO.,

Respondent.

Petition For Writ Of Certiorari To The Illinois Supreme Court

PETITION FOR WRIT OF CERTIORARI

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18 pp

QUESTION PRESENTED

Petitioner purchased an insurance policy from Respondent that provided coverage against assault and battery charges, among other things. When petitioner was charged with assault and battery in a criminal complaint, respondent refused to cover the costs of petitioner's successful defense. The lower courts held that insurance coverage does not extend to a criminal charge because a criminal charge is not a suit for damages. In so holding the lower courts announced a rule of law that the imposition of restitution in a criminal case is not compensation for damages but rather is exclusively a penalty imposed against a criminal defendant. The question presented here is: Is restitution in a criminal case exclusively penal in nature?

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PETITION FOR WRIT OF CERTIORARI

Marshall Spiegel ("Spiegel") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Illinois Appellate Court to resolve the issue of whether restitution in a criminal case is exclusively punishment.

OPINIONS BELOW

The opinion of the Illinois Court of Appeals that gives rise to this petition is reprinted in Appendix A hereto ("App. A") at page A-1. The Illinois Supreme Court denied the Petition for Leave to Appeal. App. B, A-9.

JURISDICTION

On December 29, 1995 the Illinois Appellate Court issued an opinion affirming the trial court's grant of summary judgment in favor of Respondent. Petitioner timely filed a Petition for Leave to Appeal to the Illinois Supreme Court which was denied on April 13, 1996. This petition has been filed within 90 days of denial of petitioner's petition for leave to appeal to the Illinois Supreme Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257.

STATEMENT OF THE CASE

Petitioner Spiegel sought coverage for the defense of a criminal battery complaint under his State Farm umbrella insurance policy which provided for insurance coverage if the insured became legally obligated to pay damages for an accident resulting in personal injury during the policy period.[1] The term "personal injury" as defined under the policy included assault and battery. State Farm refused to defend Spiegel, contending that the insurance policy did not cover battery. Spiegel was subsequently acquitted of the battery charge.

The trial court granted summary judgment to State Farm, ruling that the insurance policy provided only for coverage against damages, and thus did not apply to defense of a criminal case. Spiegel appealed, pointing out that under Illinois law a criminal defendant may be liable for restitution[2] and that the damages awarded as restitution are equivalent to damages in a civil case.[3] The Appellate Court affirmed the grant of summary judgment and

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[1] Coverage for assault and battery was a standard coverage item commonly included in insurance policies by most carriers.

[2] Had Spiegel been convicted in the criminal case, restitution would have been mandatory because of the age of the complaining witness.

[3] 730 ILCS §5/5-5-6 provides that a sentencing judge may order that a defendant pay restitution, and, where the victim is 65 or older, the judge *must* order restitution. The same section of the Illinois criminal code provides that the amount of restitution is to be determined by the "actual out-of-pocket expenses, losses, damages, and injuries suffered by the victim . . . . " 730 ILCS §5/5-5-6(b). The order of restitution is enforceable as a civil judgment for damages. 730 ILCS §5/5-6(m).

the Illinois Supreme Court refused to grant Spiegel leave to appeal.

REASONS FOR GRANTING THE WRIT

The opinion of the lower courts was based upon a holding that an award of restitution is not "damages" as the term is used in the insurance policy, which limits coverage to situations in which the insured may be required to pay damages.

The holding in this case by the courts below that an order of restitution is not an award of damages is in conflict with legislative intent underlying the restitution statute and existing precedent which has construed the restitution statute as providing an avenue for victims to recover civil damages from convicted criminals.

The availability of criminal restitution to provide civil damages to a victim is discussed in *People v. Mitchell*, 241 Ill.App.3d 1094, 610 N.E.2d 794, 797 (4 Dist. 1993). The court stated: "We conclude that section 5-5-6 of the Code basically allows for a court order which at least partially substitutes for civil relief in favor of the injured party or parties." In *People v. Nasser*, 223 Ill.App.3d 400, 410, 584 N.E.2d 1010, 1016 (1991) it was held that the legislature intended the restitution provisions of the Illinois criminal code to be a vehicle for a victim to recover monetary damages from the assailant. The court stated "we believe trial courts have a duty, to the extent possible, to order restitution to benefit victims so that they can avoid the bother, expense, and delay too often present in the civil justice system." In *Benedick v. Mohr*, 233

Ill.App.3d 903, 600 N.E.2d 63, 68 (5th Dist. 1992) the Court held that an order of restitution triggers the doctrine of collateral estoppel regarding the issue of damages in a subsequent civil case brought on the facts underlying the criminal complaint. The Court stated, "[w]e see no reason to force plaintiff to go through the expense of a trial so that defendant can attempt to obtain an inconsistent judgment from another trier of fact or to escape her obligation to reimburse plaintiff fully for the money she has stolen. Defendant has had her day in court and she is precluded from relitigating the same factual issue over and over."

Clearly, an order of restitution is an award of "damages" under Illinois law. Thus, because there was a possibility of coverage, all exclusions, conditions, or provisions which tend to defeat liability must be construed most favorably to the insured. *Elco Industries, Inc. v. Liberty Mut. Ins.* Co., 90 Ill.App.3d 1106, 414 N.E.2d 41 (1st. Dist. 1980); *Standard Mutual Insurance Co. v. General Casualty Cos.*, 171 Ill.App.3d 758, 764, 525 N.E.2d 965, 969 (1988). In short, the insurance company was obligated to provide coverage to Spiegel because there was a possibility of coverage.[4]

The rule of law announced by the Illinois courts in this case is that restitution is purely punishment. Carried to its logical extreme, this rule of law could be cited as a basis for affording double jeopardy protection to a criminal defendant who is later sued for restitutionary damages. This argument would be available because

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[4] State Farm subsequently changed its policy to eliminate coverage for assault and battery.

restitution has been held to be a substitute for a claim for civil damages. If restitution is exclusively penal in nature, then the subsequent suit for restitutionary damages could be alleged to be a second punishment for the same offense. This result would be in conflict with this Court's recent holding that civil forfeitures do not constitute punishment for purposes of the double jeopardy clause. *United States v. Ursery*, No. 95-345 (June 24, 1996).

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Marshall Spiegel
Petitioner pro se

APPENDIX

ILLINOIS APPELLATE COURT

FIFTH DIVISION

December 29, 1995

No. 1-94-3753

MARSHALL SPIEGEL, Plaintiff-Appellant, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. Honorable Albert Green, Judge Presiding.

JUSTICE McNULTY delivered the opinion of the court:

Plaintiff Marshall Spiegel appeals from a trial court order granting summary judgment in favor of defendant State Farm Fire and Casualty Company (State Farm) in plaintiff's declaratory judgment action. We affirm.

Plaintiff was involved in an altercation with his neighbors, as a result of which he was charged with criminal battery. Plaintiff sought coverage for the defense of the criminal charge under the State Farm umbrella insurance policy that had been issued to him. State Farm denied coverage on the basis that the battery was based on criminal intent, and the policy excluded intentional acts from coverage. Plaintiff was later acquitted of the battery charge.

Plaintiff filed a declaratory judgment action against State Farm, seeking a declaration that State Farm improperly denied coverage for plaintiff's defense of the criminal charge. The trial court granted State Farm's motion

for summary judgment, holding that the State Farm policy did not provide coverage to defend against the criminal complaint filed against plaintiff because the criminal complaint was not an action for damages. Plaintiff appeals, contending that the trial court erred in determining that the criminal battery charge was excluded from coverage on the basis that it was not an action for damages and was an intentional act.

An insurer is obligated to defend those actions where the complaint alleges facts potentially within the coverage of the policy, even if the allegations are groundless, false or fraudulent. (*Thornton v. Paul* (1978), 74 Ill. 2d 132, 384 N.E.2d 335). Here, however, plaintiff has failed to show any facts demonstrating potential coverage.

The State Farm policy provides that, "If you are legally obligated to pay damages for a loss, we will pay your net loss minus the retained limit." The policy defines "loss" as "an accident that results in personal injury or property damage during the policy period" and "net loss" as "the amount you are legally obligated to pay as damages for personal injury or property damage." "Personal injury" is defined under the policy as "bodily harm, sickness, disease shock, mental anguish or mental injury," "false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution or humiliation," "libel, slander, defamation of character or invasion of rights of privacy" and "assault and battery."

Plaintiff seeks to recover defense costs from State Farm on the basis of the policy language providing coverage for battery. State Farm claims and the trial court agreed that the although the policy provides coverage for

damages resulting from a battery, the criminal charges brought against plaintiff do not seek the recovery of damages. In *Shelter Mutual Insurance Co. v. Bailey* (1987), 160 Ill. App. 3d 146, 513 N.E.2d 490, a criminal battery charge was brought against the insured, and the insured sought reimbursement of defense fees from the insurer. The court found that the insurer had no duty to defend, stating:

> "[O]nly suits for damages are to be defended under the policies involved in the instant case. A criminal complaint does not seek damages. It is penal in nature. Furthermore, the automobile liability and homeowner's insurance policies in the instant case provide that the 'Company shall defend any suit alleging such bodily injury or property damage and seeking damages.' " (*Shelter*, 160 Ill. App. 3d at 156.)

Plaintiff asks us to depart from the rule set forth in *Shelter* on the basis that the Uniform Code of Corrections (Code) provides that a sentencing judge may order that a defendant pay restitution, and in cases where the victim is 65 or older, the judge must order restitution. (730 ILCS 5/5-5-6 (West 1994).) Plaintiff claims that restitution is comparable to damages since the Code provides that the amount of restitution is to be determined by the "actual out-of-pocket expenses, losses, damages, and injuries suffered by the victim" (730 ILCS 5/5-5-6(b) (West 1994)) and the order of restitution is enforceable as a civil judgment for damages (730 ILCS 5/5-5-6(m) (West 1994)).

Plaintiff has produced no evidence suggesting that restitution was sought in the criminal battery complaint that was filed against him. Plaintiff did not provide a

copy of the criminal complaint to State Farm when requesting defense and coverage, nor has he provided the court with a copy of the complaint. An appellant has a duty to present the reviewing court with a complete record, and any doubts arising from an incomplete record are therefore resolved against the appellant. (*Firkus v. Firkus* (1990), 200 Ill. App. 3d 982, 558 N.E.2d 554.) We do not address the issue of whether restitution constitutes damages under plaintiff's insurance policy with State Farm. Because plaintiff has not shown us that restitution was even a possibility in the criminal case, he has shown no potential coverage under the State Farm policy.

The State Farm policy also excludes coverage for personal injury or property damage which is either intended or expected by plaintiff. The offense of battery is defined in the Illinois Criminal Code of 1961 as follows:

> "A person commits battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." (720 ILCS 5/12-3 (West 1994).)

If a complaint alleges only that a battery was committed intentionally and does not also allege negligent conduct, the intentional acts exclusion would preclude coverage. (See *Farmers Automobile Insurance Association v. Medina* (1975), 29 Ill. App. 3d 224, 329 N.E.2d 430.) There is no allegation that plaintiff had been charged with anything other than criminal battery. This charge of intentional conduct is therefore excluded from coverage under the State Farm policy and clearly shows that State Farm had

no duty to defend plaintiff against the criminal charge that had been brought against him.

Accordingly, for the reasons set forth above, the trial court order granting summary judgment in favor of State Farm is affirmed.

Affirmed.

COUSINS, P.J., concurs.

T. O'BRIEN, J., specially concurs.

T. O'BRIEN, J., specially concurring.

I concur in the result reached by the majority, but believe that the issue of whether restitution constitutes damages under plaintiff's insurance policy ought to be addressed.

Notwithstanding the fact that plaintiff has produced no evidence suggesting restitution was actually sought in the criminal battery complaint, I believe restitution imposed for a violation of the Illinois Criminal Code does not constitute "damages" within the meaning of plaintiff's insurance policy as a matter of law.

7505/5-5-6(b) provides:

> In fixing the amount of restitution to be paid in cash . . . the court shall assess the actual out of pocket expenses, losses, damages and injuries suffered by the victim . . . provided that in no event shall restitution be ordered to be paid on account of pain and suffering.

While "out of pocket expenses, losses, damages and injuries suffered by the victim . . . " may suggest some

sort of economic loss equal to damages, one must look to the reason for the imposition of an order of restitution.

The Illinois Criminal Code (730 ILCS 5/5-5-6) sets forth the circumstances under which a court can order restitution.

> In all *convictions* for *offenses* in *violation of the Criminal Code of* 1961 [750 ILCS 5/1-1, et seq.] . . . committed against any person 65 years of age or older in which the person received injury . . . as a result of the *criminal act* of the defendant . . . the court shall order restitution as provided in this Section. In all other cases, the court shall at the *sentence hearing* determine whether restitution is an *appropriate sentence* to be imposed on each defendant *convicted* of an *offense.* (Emphasis added.)

As previously noted, the statute authorizes, when appropriate, restitution "as a result of *convictions* for offenses. . . . " It further speaks in terms of [determining] at the sentencing hearing . . . whether restitution is an appropriate *sentence* to be imposed on each defendant *convicted* of an *offense.* When the foregoing language is read together, I believe it demonstrates a legislative intent to make restitution a penalty for the commission of a criminal offense and not merely a substitute for civil damages. Words such as "convictions", "offenses", and "sentencing hearing" do not connote a forum where the ultimate disposition is meant to be an order for civil damages. Since restitution in the context of the above language connotes a penalty or punishment for a criminal offense, I believe it would be against public policy to either indemnify or defend an insured who was prosecuted for a criminal offense.

While no Illinois case precisely addresses the issue that indemnification cannot be had for the performance of a criminal act, the principle is otherwise not the subject of serious dispute.

In *Shew & Brotherton v. Southern Fire & Casualty Co. & Dredell County*, 307 N.C. 438, 298 S.E.2d 380, an insured sought coverage for reimbursement of money he was ordered to pay the county for damage to its property resulting from various traffic charges as well as misdemeanor assault. In denying coverage, the North Carolina Supreme Court held:

> As an insurer has no legal obligation to defend a criminal proceeding brought against an insured arising out of the operation of an automobile causing injury or damages, see 6C J. Appleman, Insurance Law and Practice Section 4431 (Buckley ed. 1979), so no obligation arises from the disposition of the criminal proceeding. Moreover, it is a basic proposition of public policy, requiring no citation of supporting authority, that an insured is not allowed to profit from his own wrongdoing. To require the [insurer defendant company] to reimburse [insured plaintiffs] for the amount ordered as restitution or to hold that the [insurer defendant company] was legally obligated to pay the amount to [plaintiff/insured's victim] would be tantamount to condoning insurance against the results and penalties of one's own criminal acts. This is against public policy. See 1 Couch on Insurance 2d Section 1:36 (2d ed. 1959); see also 7 Blashfield Automobile Law and Practice Section 291.1 (3d ed. 1966).

In light of the above analysis, I would find that neither a duty to defend nor indemnify exists under the plaintiff's policy as a matter of law.

ILLINOIS SUPREME COURT
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April 3, 1996

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No. 80538 – Marshall Spiegel, petitioner, v. State Farm Fire and Casualty Company, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Bilandic, C.J., took no part.

The mandate of this Court will issue to the Appellate Court on April 25, 1996.

(2)

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October Term, 1995

MARSHALL SPIEGEL,

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v.

STATE FARM FIRE AND CASUALTY CO.,

Respondent.

Petition For Writ Of Certiorari To The Illinois Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Illinois appellate court erred in holding that the State Farm personal liability umbrella policy did not provide coverage for the criminal complaint brought against petitioner because the criminal complaint was not an action for damages.

RULE 29.6 STATEMENT

In accordance with United States Supreme Court Rule 29.6, State Farm Fire and Casualty Company states that its parent company is State Farm Mutual Automobile Insurance Company. There are not any non-wholly owned subsidiaries of State Farm Fire and Casualty Company.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

State Farm & Casualty Company ("State Farm") respectfully requests that the petition for writ of certiorari filed by Marshall Spiegel ("Spiegel") be denied. The issue of whether an order of restitution in a criminal proceeding is covered by State Farm's personal liability umbrella policy ("State Farm policy") is a hypothetical exercise and not properly before this Court as Spiegel never presented any evidence that restitution was sought in the criminal action against him. Furthermore, this is solely a question of state law and does not raise any federal issue.

JURISDICTION

Respondent objects to petitioner's jurisdictional statement as the jurisdiction of this Court is not invoked pursuant to 28 U.S.C. §1257. No Illinois statute is drawn in question on the ground that it is repugnant to the Constitution, treaties, or laws of the United States nor has any title, right, privilege, or immunity been specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Spiegel has not set forth *any* constitutional provision, treaty, statute, ordinance and/or regulation purportedly involved in this case as required by United States

Supreme Court Rule 24(f). Respondent submits that no such constitutional issue is involved in this case. Illinois case law clearly governs the issue and mandates that Spiegel's petition for writ of certiorari be denied.

STATEMENT OF THE CASE

On May 24, 1993, Spiegel was involved in a confrontation with his neighbors which resulted in an altercation. As a result, Spiegel was charged with the criminal offense of battery in the circuit court of Cook County in criminal case No. 93 MC1-292918 entitled *City of Chicago v. Marshall Spiegel,* filed on May 29, 1993 ("criminal complaint"). Spiegel did not provide State Farm with a copy of the criminal complaint as required as a condition of coverage under the State Farm policy issued to him. Notwithstanding Spiegel's failure to provide a copy of the criminal complaint, State Farm responded with a reservation of rights letter before concluding that the nature of the alleged battery was based on criminal intent. State Farm subsequently denied coverage for the criminal complaint.

The trial court granted summary judgment in favor of State Farm, holding the State Farm policy did not provide coverage or defense with respect to the criminal complaint filed against Spiegel because the criminal complaint was not an action for damages. The Illinois appellate court affirmed summary judgment in favor of State Farm, noting that Spiegel never provided a copy of the criminal complaint to State Farm or to the trial court nor did he produce any evidence suggesting that restitution was sought in the criminal battery complaint filed against

him. The Illinois supreme court denied Spiegel's petition for leave to appeal. At no time in these state court proceedings was a federal question raised.

ARGUMENT

Review is not warranted as the decision of the Illinois appellate court was correct based on the facts before it and on well-established Illinois case law. United States Supreme Court Rule 10 provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory powers;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Spiegel's petition for a writ of certiorari does not involve any of the above-stated considerations. A United States court of appeals has not rendered a decision in this matter. Further, this case does not involve an important federal question (or any federal question) let alone one that conflicts with the decision of another state court of last resort or a decision of a United States court of appeals. Briefly stated, Spiegel is merely a litigant who is unhappy with the Illinois appellate court's ruling on an issue that is solely a matter of state law. Furthermore, the ruling of the Illinois appellate court is a correct statement of Illinois law.

A. THE CRIMINAL COMPLAINT FILED AGAINST MR. SPIEGEL DID NOT SEEK "DAMAGES"

The Illinois appellate court correctly ruled that the State Farm policy did not provide coverage for the criminal complaint against Spiegel because the criminal complaint was not an action for damages. As noted in the Illinois appellate court's opinion, the State Farm policy provides, "If you are legally obligated to pay damages for a loss, we will pay your net loss minus the retained limit." The State Farm policy defines "loss" as "an accident that results in personal injury or property damage during the policy period" and "net loss" as "the amount

you are legally obligated to pay as damages for personal injury or property damage."

Spiegel suggests that existing precedent and the appellate court's ruling are incorrect because there is the "possibility" that he could have been ordered to pay restitution by a sentencing judge. Spiegel argues that an order for restitution would constitute "damages" thereby requiring State Farm to defend him in the criminal action. As an initial matter, Spiegel did **not** provide a copy of the criminal complaint to State Farm when requesting coverage nor did he attach a copy of the criminal complaint to his complaint against State Farm. Further, Spiegel did not present any evidence that restitution was sought in the criminal case. An appellant has a duty to present the reviewing court with a complete record, and any doubts arising from an incomplete record are therefore resolved against the appellant. *Firkus v. Firkus*, 200 Ill.App.3d 982, 558 N.E.2d 554 (1990). Spiegel's suggestions as to what was sought in the criminal complaint or how the court might have fixed his punishment had he been convicted are merely hypotheticals which in no way trigger coverage under the State Farm policy.

Even assuming *arguendo* that Spiegel had produced evidence that restitution was actually imposed as a result of the criminal complaint, restitution does not constitute "damages" under an insurance policy. Monetary penalties in a criminal case are not "damages" but are penal in nature. See *Shelter Mutual Insurance Co. v. Bailey*, 160 Ill.App.3d 146, 513 N.E.2d 490 (1987). The Illinois appellate court in this case followed *Shelter*, which is directly on point, and held that State Farm did not have a duty to defend Spiegel against the criminal complaint. As Justice

O'Brien's concurring opinion (Petition, A.6) stated, "I believe restitution imposed for a violation of the Illinois Criminal Code does not constitute damages within the meaning of plaintiff's insurance policy as a matter of law." Justice O'Brien emphasized that one must look to the reason for the imposition of an order of restitution. After referencing the Illinois Criminal Code at 730 ILCS 5/5-5-6, Justice O'Brien stated:

> As previously noted, the statute authorizes, when appropriate, restitution 'as a result of *convictions* for offenses . . . .' It further speaks in terms of [determining] at the sentencing hearing . . . whether restitution is an appropriate *sentence* to be imposed on each defendant *convicted* of an *offense*. When the foregoing language is read together, I believe it demonstrates a legislative intent to make restitution a penalty for the commission of a criminal offense and not merely a substitute for civil damages. Words such as 'convictions', 'offenses', and 'sentencing hearing' do not connote a forum where the ultimate disposition is meant to be an order for civil damages. Since restitution in the context of the above language connotes the penalty or punishment for a criminal offense, I believe it would be against public policy to either indemnify or defend an insured who is prosecuted for a criminal offense. (Emphasis added)

Spiegel has continued to cite the same case law, all of which is clearly distinguishable. In fact, Spiegel has not cited any case which deals with whether or not restitution constituted "damages" under an insurance policy. State Farm cited case law which directly addressed the issue of whether or not restitution constitutes "damages"

under an insurance policy and these courts answered the question in the negative. See *Jaffe v. Cranford Insurance Co.*, 168 Cal.App.3d 930, 214 Cal.Rptr. 567 (1985); *State Farm Fire & Casualty Company v. Pahl*, 191 Cal.App.3d 74, 236 Cal.Rptr. 216 (1987).

Spiegel was charged with the offense of **criminal** battery. Had Spiegel been convicted and his sentence been a fine, this fine would be Spiegel's penalty or punishment for the commission of a crime. Had Spiegel been convicted and his sentence been imprisonment, this imprisonment would be Spiegel's penalty or punishment for the commission of a crime. Similarly, had Spiegel been convicted and his sentence been restitution, this restitution would be Spiegel's penalty or punishment for the commission of a crime. Neither a fine, imprisonment nor court-ordered restitution are the result of "an accident which results in . . . property damage" as required by State Farm's policy. It would be against public policy for State Farm to defend or indemnify Spiegel for his criminal acts and the penalties or punishments that result from those criminal acts. See *Beaver v. Country Mutual Insurance Co.*, 95 Ill.App.3d 1122, 420 N.E.2d 1058 (5th Dist. 1981) (insurance against criminal fines or penalties would be void as against public policy).

B. THE STATE FARM POLICY DOES NOT CONTAIN CONFLICTING CLAUSES

Spiegel correctly states that the State Farm policy grants coverage for certain intentional torts, including assault and battery. If a civil complaint had been filed against Spiegel alleging one of the covered intentional

torts, State Farm would have provided coverage. However, Spiegel was not alleged to have committed an intentional tort and there was not a civil complaint seeking damages filed against him as a result of the events of May 24, 1993. Spiegel was alleged to have committed a *crime* for which the State Farm policy did not provide coverage.

C. SPIEGEL'S SUGGESTION OF DOUBLE JEOPARDY IS WITHOUT FOUNDATION

On pages 4-5 of the petition, Spiegel cites *United States v. Ursery*, 1996 W.L. 304815 (U.S. 1996) and suggests that in some fashion he has been or could be subjected to double jeopardy. The *Ursery* case dealt with civil forfeiture proceedings under 21 U.S.C. § 881(a)(6) and (7) instituted against defendants in concert with various criminal drug prosecutions. This Court held that civil *in rem* forfeitures were not "punishment" for purposes of the double jeopardy clause. The double jeopardy clause does not apply to this case as Spiegel was only *once* charged with a crime and any hypothetical *civil* suit would not trigger any constitutional question with respect to double jeopardy clause. There has only been one criminal charge filed against Spiegel and he was acquitted of that charge. Apparently Spiegel maintains that he might have been sued in a civil action for damages and that had damages been awarded, those civil damages would have duplicated the criminal punishment of restitution that might have been ordered had he been found guilty of assault and battery. Spiegel's argument is entirely hypothetical as

none of those events occurred. Furthermore, his position is without merit even if those events had occurred.

Spiegel was accused of a crime. At no time was there a second criminal proceeding against him nor was a civil proceeding for damages filed against him. Nonetheless and even assuming such a civil action, the double jeopardy clause would not be triggered. Civil actions frequently proceed against individuals who commit criminal offenses. For example, a person involved in an automobile accident can be convicted and punished for a criminal offense such as drunk driving or manslaughter and can also be subject to a civil suit for damages based upon the same automobile accident. That individual's criminal punishment (be it a fine, restitution or imprisonment) does not bar the civil action. Similarly, any punishment that might have been imposed on Spiegel had he been convicted (be it a fine, restitution or imprisonment) for committing the crime of battery would not bar a civil action against him nor would it raise an issue under the double jeopardy clause.

CONCLUSION

The Illinois appellate court properly affirmed summary judgment in favor of State Farm & Casualty Company based on the facts before if and well-established Illinois precedent. The Illinois supreme court properly denied Spiegel's petition for leave to appeal. There are not any grounds for Spiegel to seek review of this decision and State Farm respectfully requests that Spiegel's

petition for writ of certiorari be denied. State Farm further requests an award of just damages and double costs against Spiegel pursuant to United States Supreme Court Rules 42 and 43 as this petition for writ of certiorari is frivolous and without any basis in fact or law.

WAYNE F. PLAZA
STEPHEN E. SWARD
Counsel of Record for State Farm Fire & Casualty Co.

(3)

Supreme Court, U.S.
FILED
SEP 4 1996
CLERK

No. 96-78

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARSHALL SPIEGEL,

Petitioners,

v.

STATE FARM FIRE AND CASUALTY CO.,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I. RESPONDENT'S REQUEST FOR SANCTIONS SHOULD BE DENIED BECAUSE RESPONDENT HAS DELIBERATELY DISTORTED THE RECORD IN THE CASE AT BAR.

Given the clumsy sleight-of-hand Respondent attempts to pass off in its Brief In Opposition, Respondent's request for "just damages" and double costs from the *pro se* Petitioner reeks with hypocrisy. (Brief In Opposition at 10). Any alleged sins of the *pro se* Petitioner pale in comparison to Respondent's blatant misrepresentations regarding the holding of the court below, misinformation concerning the contents of the insurance policy at issue and distortions of the arguments concerning double jeopardy. Respondent's Brief is a gross violation of Supreme Court Rule 15.1 because it does not assist this "Court in the exercise of its discretionary jurisdiction". Instead it hinders that objective by distorting the facts and muddying the issues.

The Opinion

By far the most egregious example of Respondent's misconduct is its repeated misrepresentations regarding the holding of the Illinois Appellate Court. Respondent states:

> The Illinois appellate court correctly ruled that the State Farm policy did not provide coverage for the criminal complaint against Spiegel because the criminal complaint was not an action for damages . . . Monetary penalties in a criminal case are not "damages" but are penal in nature. See, *Shelter Mutual Insurance Co. v. Bailey*, 160 Ill App. 3d 146, 513 N.E. 2d 490 (1987). The Illinois appellate court in this case followed *Shelter*, which is directly on point, and held that State Farm did not have a duty to defend Spiegel against the criminal complaint.

(Brief In Opposition at 4-5).

This is simply not true. Even a cursory examination of the Appellate Court opinion reveals that the Appellate Court did not follow *Shelter*, did not hold that monetary penalties in a criminal case are not "damages," and did not hold that Respondent did not have a duty to defend. Instead, the opinion of the Appellate Court states: "We *do not address the issue* of whether restitution [in a criminal case] constitutes damages under plaintiff's insurance policy with State Farm." (Petition for Writ of Certiorari at A4). (Emphasis added).

Contrary to Respondent's representations, *Shelter* is not at all on point. First, *Shelter* did not even involve restitution. Second, *Shelter* found that the policy in that case excluded assault and battery through an exclusionary clause. 513 N.E. 2d at 497-98. Unlike the policy in the case at bar, the insurance policy in *Shelter* did not have language specifically providing for insurance coverage for battery. The policy in this case specifically includes battery in its coverage, as Respondent concedes. (Brief In Opposition at 7).

The Policy

After intentionally mangling the Appellate Court opinion, Respondent proceeds to distort the contents of the policy. While Respondent concedes that the "policy grants coverage for . . . battery," it inserts the words "intentional torts." (*Id.* at 7). Nowhere does the policy restrict coverage to "intentional torts": it simply covers battery, the latter being the charge against Petitioner. Moreover, nowhere does the policy exclude coverage for a crime, again contrary to Respondent's assertion. (*Id.* at 8).

Nor is it against public policy in Illinois for an insurance company to defend or indemnify against criminal

acts, as Respondent argues. In *Dixon Distrib. Co., v. Hanover Ins. Co.*, 244 Ill. App. 3d 837, 612 N.E.2d 846 (1993) the Appellate Court carefully analyzed a contention similar to Respondent's, and held that public policy does not prohibit insurance companies from defending against intentional torts which constitute crimes. The Court noted that the determination of public policy is a "function of the legislature, not the courts," and there was no statute or legislative directive prohibiting insurance indemnification for intentional torts. 612 N.E. 2d at 852. In addition, the Court reasoned, the case law was replete with examples of insurance policies that were written to indemnify against the consequences of injuries inflicted intentionally or even willfully by the insured. Public policy is not offended by an innocent party attempting to protect himself against the high cost of litigation merely because the charge is of an intentional act, the Court held. The better side of the public policy argument favors coverage of the costs of defense, the Court concluded. *Id.*

The Petition

Respondent argues:

> Spiegel suggests that existing precedent and the appellate court's ruling are incorrect because there is the "possibility" that he could have been ordered to pay restitution by a sentencing judge. Spiegel argues that an order for restitution would constitute "damages" thereby requiring State Farm to defend him in the criminal action. As an initial matter, Spiegel did *not* provide a copy of the criminal complaint to State Farm when requesting coverage nor did he attach a copy of the criminal complaint to his complaint against State Farm. Further, Spiegel did not present any evidence that restitution was sought in the crim-

> inal case . . . Spiegel's suggestions as to what was sought in the criminal complaint or how the court might have fixed his punishment had he been convicted are merely hypotheticals which in no way trigger coverage under the State Farm policy.

(Brief In Opposition at 5). (Emphasis in original).

This is the most specious argument of all. First, Petitioner did not suggest, and Respondent provides no citation for its alleged quotation, that restitution was only a "possibility" in his case. It was mandatory upon conviction because it is undisputed that Petitioner was charged with battery against a person over the age of 65. The applicable Illinois statute, 730 ILCS 5/5-5-6, mandates an order of restitution upon conviction of that offense. That statute states in relevant part: "In all convictions for offenses in violation of the Criminal Code of 1961 committed against any person 65 years of age or older in which the person received any injury to their (*sic*) person . . . the court *shall* order restitution as provided in this Section." (Emphasis added). (Appendix to Reply Brief at A1-A2). The Appellate Court was required to take judicial notice of this statute. 735 ILCS 5/8-1003 ("Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United Sates."). (Appendix to Reply Brief at A3). *See also*, *Rockford v. Gill*, 60 Ill. App. 3d 194, 376 N.E. 2d 420 (1978). In fact, the concurring opinion quotes the relevant portion of the restitution statute. (Petition at A4). Thus Petitioner did present evidence that restitution was an absolute certainty upon conviction, not a mere possibility or a hypothetical.

Respondent's remarks about the contents of the criminal complaint and the failure to provide a copy are equally spurious. The applicable Illinois statute, 725

ILCS 5/111-3(a), provides that a criminal complaint need only allege the name of the offense, its nature and elements, the date and county in which it took place, and the name of the accused along with a citation to the statutory provision. (Appendix to Reply Brief at A4). *See also, People v. Johnson*, 252 Ill. App. 3d 609, 626 N.E. 2d 230 (1993). For this reason it is axiomatic that criminal complaints, even in death penalty cases, *never* specify the punishment sought. Respondent (and the Appellate Court) are charged with such knowledge. Once again, the Appellate Court was required to take judicial notice of this statute pursuant to 735 ILCS 5/8-1003. The failure of Petitioner to provide Respondent with a copy of the complaint is a pure red herring because Respondent did not decline coverage based upon this provision. (*See*, Appendix to Reply Brief at A5 -A9: letter dated September 3, 1993, from State Farm Insurance Companies to Marshall C. and Carol Spiegel.).

Finally, an order of restitution would constitute "damages" resulting from inflicting personal injury within the meaning of the policy, thereby triggering coverage. Respondent fails to mention that Illinois law defines "restitution" as the "actual out-of-pocket expenses, losses, *damages*, and injuries suffered by the victim. . ." 730 ILCS §5/5-5-6(b). (Emphasis added).

The similarity of criminal restitution to civil damages is discussed in *People v. Mitchell*, 241 Ill. App. 3d 1094, 610 N.E.2d 794, 797 (4th Dist. 1993). The court stated: "We conclude that section 5-5-6 of the Code basically allows for a court order which at least partially substitutes for civil relief in favor of the injured party or parties."

Similarly, in *People v. Nasser*, 223 Ill. App. 3d 400, 410, 584 N.E. 2d 1010, 1016 (1991) the court held that

the legislature intended the restitution provisions to be a vehicle for a victim to recover monetary damages from the assailant. The court stated, "we believe trial courts have a duty to the extent possible, to order restitution to benefit victims so that they can avoid the bother, expense, and delay too often present in the civil justice system. This duty is mandated by the legislative intent underlying section 5-5-6 of the Code (Ill. Rev. Stat. 1989, ch. 38, par. 1005-5-6). The focus of concern for the courts ought to be that victims of crime, who have been forced to endure the suffering, inconvenience, and hardship frequently associated with that status, receive remuneration for the damages they have suffered." Interestingly, the Court in *Nasser* specifically noted its disagreement with the California case law cited by Respondent. (Brief In Opposition at 7). The Illinois Court held in *Nasser* that providing a victim with an inexpensive and expeditious alternative to the civil justice system for the collection of damages was the legislative intent in enacting the restitution provisions of the Illinois Criminal Code.

In *Benedick v. Mohr*, 233 Ill. App. 3d 903, 600 N.E. 2d 63 (5th Dist. 1992) the Court held that an order of restitution had a collateral estoppel effect on the issue of damages in a subsequent civil case brought on the facts underlying the criminal complaint. The Court stated, "[w]e see no reason to force plaintiff to go through the expense of a trial so that defendant can attempt to obtain *an inconsistent judgment* from another trier of fact or to escape her obligation to reimburse [plaintiff] fully for the money she has stolen. Defendant has had her day in court and she is *precluded from relitigating the same factual issue over and over*." 600 N.E. 2d at 68. (emphasis added).

In conclusion, it is unconscionable that members of the bar, such as Respondent's counsel, would deliberately distort the opinion and the record as they have done in the case at bar. Because Respondent comes before this Court with such "unclean hands", for this reason alone its request for sanctions should be denied.

II. THE DOUBLE JEOPARDY ARGUMENT PROFFERED BY THE PRO SE PETITIONER IS NOT FRIVOLOUS AND DOES NOT WARRANT THE IMPOSITION OF SANCTIONS.

Treating the case for the moment as does the Petition and Respondent's Brief in Opposition, it is apparent that a colorable double jeopardy issue is presented.[1]

The concurring opinion states:

> I believe it demonstrates a legislative intent to make restitution a penalty for the commission of a criminal offense and not merely a substitute for civil damages . . . restitution in the context of the above language connotes a penalty or punishment for a criminal offense. . .

The Petition, citing *Benedick v. Mohr*, *supra*, 600 N.E. 2d at 68, notes that "an order of restitution triggers the doctrine of collateral estoppel regarding the issue of damages in a subsequent civil case brought on the facts underlying the criminal complaint." (Petition at 4). This, of course, is an important component of the protection

---

[1] Respondent is correct in stating that the *pro se* Petitioner failed to comply with Supreme Court Rule 24(f) because he failed to set out verbatim the double jeopardy clause of the Fifth Amendment (". . .nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . .). However, Petitioner quite clearly identified double jeopardy as the constitutional basis of the Petition. (Petition at 3-5).

against double jeopardy. *Ashe v. Swenson*, 397 U.S. 436 (1970).

The Petition proceeds to argue that:

> If restitution is exclusively penal in nature, then the subsequent suit for restitutionary damages could be alleged to be a second punishment for the same offense. This result would be in conflict with this Court's recent holding that civil forfeitures do not constitute punishment for purposes of the double jeopardy clause. *United States v. Ursery*, No. 95-345 (June 24, 1996).

(Petition at 5).

This argument is not as far-fetched as the rebuttal proffered by Respondent. Respondent first states that *Ursery* "held that civil *in rem* forfeitures were not punishment for purposes of the double jeopardy clause." (Brief in Opposition at 8). Actually, *Ursery* is not that broad because it did not hold that *all* civil *in rem* forfeitures were not punishment: "These civil forfeitures (and civil forfeitures generally), we hold, do not constitute 'punishment' for purposes of the Double Jeopardy Clause." *United States v. Ursery*, ___ U.S. ____, 116 S. Ct. 2135, 2138 (1996). Later the Court stated:

> That a forfeiture is designated as civil by Congress and proceeds *in rem* establishes a presumption that it is not subject to double jeopardy. Nevertheless, where the "clearest proof" indicates that an *in rem* civil forfeiture is "so punitive either in purpose or effect" as to be equivalent to a criminal proceeding, that forfeiture may be subject to the Double Jeopardy Clause.

Id. at 2148 n. 3. (citations omitted).

Respondent then argues that double jeopardy does not apply because "[t]here has only been one criminal charge

filed against Spiegel," and therefore his "argument is entirely hypothetical. . ." (Brief in Opposition at 8). Apparently Respondent is unaware that double jeopardy protects not only against multiple convictions and punishments, but also against multiple prosecutions, for the same offense. *United States v. Dixon*, 509 U.S. 688, 696 (1993). This is the reason that, contrary to the general rule, a defendant is permitted to appeal the denial of a colorable double jeopardy motion prior to trial. *Abney v. United States*, 431 U.S. 651 (1977). Double jeopardy protects against the ordeal, time, and expense of going through the second trial. Thus, contrary to Respondent's argument, the fact that Petitioner was not actually subjected to two trials does nothing to undermine his double jeopardy argument.

Respondent also maintains that a civil suit can never trigger double jeopardy protection. (Brief in Opposition at 9). Respondent, who cites no double jeopardy caselaw other than *Ursery*, has obviously never heard of this Court's decision in *United States v. Halper*, 490 U.S. 435 (1989). *Halper* made quite clear the fact that the labels "civil" and "criminal" do not control for purposes of double jeopardy analysis. 490 U.S. at 447. *See also, Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ____, 114 S. Ct. 1937, 1948 (1994) (Drug tax statute enforced in civil proceeding may be characterized as punishment for purposes of double jeopardy clause); *Austin v. United States*, 509 U.S. 602 (1993) (Civil forfeiture subject to limitations of excessive fines clause of Eighth Amendment). Thus, contrary to Respondent's contention, a civil action can trigger double jeopardy protection.

If the state seeks multiple punishments in a single proceeding, the concerns underlying the Double Jeopardy Clause are not implicated, and the only inquiry is

"whether the legislature actually authorized the cumulative punishment."[2] In contrast, where the state seeks multiple punishments in multiple proceedings, the Double Jeopardy Clause ensures that the state will neither use multiple proceedings to harass or exhaust particular defendants,[3] nor seek "a second punishment when it is dissatisfied with the punishment levied in the first action."[4]

In the case at bar if restitution as defined by the Illinois statute is exclusively punishment, then double jeopardy would be implicated under the following scenario. In a criminal prosecution the defendant is convicted and sentenced to prison. In a subsequent civil suit by the state seeking damages, the defendant raises the bar to double jeopardy because the damages are the same as restitution, which constitutes punishment. The defendant argues that the prosecution is seeking multiple punishments in multiple proceedings. Moreover, to the extent that restitution equates with civil forfeiture, the concurring opinion in the court below arguably conflicts with *Ursery*.

CONCLUSION

For the reasons set forth above, Respondent's request for an award of just damages and double costs pursuant to Rules 42 and 43 should be denied, and Petitioner prays that the Petition is granted.

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[2] *Halper*, 490 U.S. at 4511 n. 10.

[3] *Abbate v. United States*, 359 U.S. 187, 198-99 (1959) (opinion of Brennan, J.); *United States v. P.H.E., Inc.*, 965 F.2d 848, 850-53 (10th Cir. 1992).

[4] *Halper*, 490 U.S. at 451 n. 10.

Respectfully submitted,

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730 ILCS 5/5-5-6

5/5-5-6. Restitution

§ 5-5-6. In all conviction for offenses in violation of the Criminal Code of 1961 committed against any person 65 years of age or older in which the person received any injury to their person or damage to their real or personal property as a result of the criminal act of the defendant, and in cases where the defendant is convicted of looting under Section 42-1 of the criminal Code of 1961, the court shall order restitution as provided in this Section. In all other cases the court shall at the sentence hearing determine whether restitution is an appropriate sentence to be imposed on each defendant convicted of an offense. If the court determines that an order directing the offender to make restitution is appropriate the offender may be sentenced to make restitution which shall be determined by the Court as hereinafter set forth:

(a) At the sentence hearing, the court shall determine whether the property may be restored in kind to the possession of the owner or the person entitled to possession thereof; or whether the defendant is possessed of sufficient skill to repair and restore property damaged; or whether the defendant should be required to make restitution in cash, for out-of-pocket expenses, damages, losses, or injuries found to have been proximately caused by the conduct of the defendant or another for whom the defendant is legally accountable under the provisions of Article V of the Criminal Code of 1961.

(b) In fixing the amount of restitution to be paid in cash, the court shall allow credit for property returned in kind, for property damages ordered to be repaired by the defendant, and for property ordered to be restored by the defendant; and after granting the credit, the court shall

assess the actual out-of-pocket expenses, losses, damages, and injuries suffered by the victim named in the charge and any other victims who may also have suffered out-of-pocket expenses, losses, damages and injuries proximately caused by the same criminal conduct of the defendant, and insurance carriers who have indemnified the named victim or other victims for the out-of-pocket expenses, losses, damages, or injuries, provided that in no event shall restitution be ordered to be paid on account of pain and suffering. If a defendant fails to pay restitution in the manner or within the time period specified by the court, the court may enter an order directing the sheriff to seize any real or personal property of a defendant to the extent necessary to satisfy the order of restitution and dispose of the property by public sale. All proceeds from such sale in excess of the amount of restitution plus court costs and the costs of the sheriff in conducting the sale shall be paid to the defendant.

(k) Nothing contained in this Section shall preclude the right of any party to proceed in a civil action to recover for any damages incurred due to the criminal misconduct of the defendant.

(l) Restitution ordered under this Section shall not be subject to disbursement by the circuit clerk under Section 27.5 of the Clerks of Courts Act.

(m) A restitution order under this Section is a judgment lien in favor of the victim that:

(1) Attaches to the property of the person subject to the order;

(2) May be perfected in the same manner as provided in Part 3 of Article 9 of the Uniform Commercial Code;

(3) May be enforced to satisfy any payment that is delinquent under the restitution order by the person in whose favor the order is issued or the person's assignee; and

(4) Expires in the same manner as a judgment lien created in a civil proceeding.

When a restitution order is issued under this Section, the issuing court shall send a certified copy of the Order to the clerk of the circuit court in the county where the charge was filed. Upon receiving the order, the clerk shall enter and index the order in the circuit court judgment docket.

(n) An order of restitution under this Section does not bar a civil action for:

(1) Damages that the court did not require the person to pay to the victim under the restitution order but arise from an injury or property damages that is the basis of restitution ordered by the court; and

(2) Other damages suffered by the victim.

Regardless of whether restitution is required under this Section as a condition of a sentence, the restitution order is not discharged by the completion of the sentence imposed for the offense.

A restitution order under this Section is not discharged by the liquidation of a person's estate by a receiver. A restitution order under the Section may be enforced in the same manner as judgment liens are enforced under Article XII of the Code of Civil Procedure.

WEST'S SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED CHAPTER 735. CIVIL PROCEDURE ACT 5. CODE OF CIVIL PROCEDURE ARTICLE VIII. EVIDENCE PART 10. JUDICIAL NOTICE

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Current through P.A. 89-456, approved 5/21/96

5/8-1003. Common law and statutes

s8-1003. Common law and statutes. Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States.

725 ILCS 5/111-3

5/111-3. Form of charge

§ 111-3. Form of charge. (a) A charge shall be in writing and allege the commission of an offense by:

(1) Stating the name of the offense;

(2) Citing the statutory provision alleged to have been violated;

(3) Setting forth the nature and elements of the offense charged;

(4) Stating the date and county of the offense as definitely as can be done; and

(5) Stating the name of the accused, if know, and if not known, designate the accused by any name or description by which he can be identified with reasonable certainty.

STATE FARM INSURANCE COMPANIES (LOGO)

September 3, 1993

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

Claim Office
1251 N. Plum Grove Road
Suite 150
Schaumburg, IL 60173
Writer's Direct Line:
(708) 490-3440

Marshall C. & Carol Spiegel
5701 N. Sheridan Road, Ste. J7
Chicago, IL 60660-4702

RE: Our Claim Number: 13-F146-999 & 13-F147-425
Policy Number: 13-72-2210-8-PLUP &
13-72-2211-0-Tenants Policy

Dear Mr. and Mrs. Spiegel:

We are writing to you in reference to the matter you tendered to us for consideration under your Personal Liability Umbrella Policy and your Tenants Policy. It is our understanding that you were looking for coverage under your policies for criminal allegations as a result of neighbor dispute in the building in which you reside.

Our review of the facts as related to us by yourself and your policy indicates we are unable to provide coverage to you for this incident. Please now refer to the two policies issued to you.

Please refer to the Personal Liability Umbrella Policy:

COVERAGES

Coverage L - Personal Liability. If you are legally obligated to pay damages for a loss, we will pay your net loss minus the retained limit. Our payment will not exceed the amount shown on the Declarations as Policy Limits - Coverage L - Personal Liability.

DEFINITIONS

The following definitions are important.

6. "loss:" means an accident that results in personal injury or property damage during the policy period. This includes injurious exposure to conditions.

8. "net loss" means:

   a. the amount you are legally obligated to pay as damages for personal injury or property damages; and

   b. All reasonable expenses you incur in the investigation, settlement and defense of a claim or suit at our request. This does not include expenses covered by another policy, expenses we cover under the Defense and Settlement section of this policy, and salaries of your employees.

9. "personal injury" means:

   a. bodily harm, sickness, disease, shock, mental anguish or mental injury. This includes required care, loss of services and death resulting therefrom. Personal injury does not include any of the following which are communi-

cable; disease, bacteria, parasite, virus, or other organism, any of which are transmitted by any insured to any other person. It also does not include the exposure to any such disease, bacteria, parasite, virus, or other organism by any insured to any other person.

b. false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution or humiliation;

c. Libel, slander, defamation of character or invasion of rights or privacy; and

d. assault and battery.

11. "property damage: means physical injury to or destruction of tangible property. This includes the loss of use caused by the injury or destruction.

EXCLUSIONS

We will not provide insurance:

2. for personal injury or property damage:

   a. which is either expected or intended by you; or

   b. to any person or property which is the result of your willful and malicious act, no matter at whom the act was directed.

The nature of this incident is criminal. It is our decision that the facts of this incident do not meet the definition of a loss as quoted above. Therefore, we see there would be no coverage under the insuring agreement under the Umbrella Policy. Furthermore, the allegations against you would be excluded per Exclusion 2.a. above.

Please now refer to your Tenants Policy:

SECTION II - LIABILITY COVERAGE

COVERAGE L - PERSONAL LIABILITY

If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence, we will:

1. pay up to our limit of liability for the damages for which the insured is legally liable; and
2. provide a defense at our expense by counsel of our choice. WE may make any investigation and settle any claim or suit that we decide is appropriate. Our obligation to defend any claim or suit ends when the amount we pay for damages, to effect settlement or satisfy a judgment resulting from the occurrence, quals our limit of liability.

DEFINITIONS

Certain words and phrases are defined as follows:

1. "bodily injury" means physical injury, including any resulting sickness or disease to a person. This includes required care, loss of services and death resulting therefrom.

   Bodily injury does not include:

   a. any of the following which are communicable: disease, bacteria, parasite, virus, or other organism, any of which are transmitted by any insured to any other person.

   b. the exposure to any such communicable disease, bacteria, parasite, virus, or other organism; or

c. emotional distress, mental anguish, humiliation, mental distress, mental injury, or any similar injury unless it arises out of actual physical injury to some person.

8. "occurrence", when used in Section II of this policy, means an accident, including exposure to conditions, which result in:

   a. bodily injury; or

   b. property damage

   during the policy period. Repeated or continuous exposure to the same general conditions is considered to be one occurrence.

9. "property damage" means physical damage to or destruction of tangible property, including loss of use of this property. Theft or conversion of property by an insured is not property damage.

SECTION II - EXCLUSIONS

1. Coverage L and Coverage M do not apply to:

   a. bodily injury or property damage

      (1) which is either expected or intended by an insured; or

      (2) to any person or property which is the result of willful and malicious acts of an insured;

Once again, with reference to this criminal charge brought against you, it would fall within the definition of occurrence of your Tenants Policy and would be excluded per Exclusion 1.a. above.

For these reasons and for any other reasons which may exist or later develop, we are unable to extend any protection to you and are notifying you we are expressly disclaiming any and all protection under policy numbers 13-72-2210-8 and 13-72-2210-0 for this criminal matter and for all other matters arising therefrom. Any legal action or conviction arising out of this will be your personal responsibility.

Should a civil suit be filed in this matter and you wish for us to review the allegations of any civil lawsuit, please forward it to us for consideration immediately.

Sincerely,

Mary P. Carroll, CPCU
Claim Superintendent
State Farm Fire & Casualty Ins. Co.

MPC/km/02/0903001

CC: Michael Braun
33 N. Dearborn Street, Ste. 500
Chicago, IL 60602

Agent Marsden